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No. 01-421

In the Supreme Court of the United States

OCEAN BULK SHIPS, INC. AND
TRANSBULK CARRIERS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners failed to rebut the United States' prima facie case that they were liable for lost and damaged cargo pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. App. 1300-1315.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 248 F.3d 331.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2001. A petition for rehearing was denied on June 8, 2001. Pet. App. D1-D3. The petition for a writ of certiorari was filed on September 6, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the loss of and damage to valuable cargo entrusted to petitioners, the United States brought suit pursuant to the Carriage of Goods by Sea Act

(COGSA), 46 U.S.C. App. 1300-1315, in the United States District Court for the Southern District of Texas. The court awarded the United States $7,300.08 in damages, Pet. App. C1, and all parties appealed, *id.* at A1-A2. The Fifth Circuit vacated the judgment of the district court and entered judgment in favor of the United States for $203,319.87 plus prejudgment interest. *Id.* at A23.

1. COGSA governs the rights and duties of shippers and carriers "from the time when the goods are loaded on to the time when they are discharged from the ship." *U.N./F.A.O. World Food Programme* v. *M/V TAY*, 138 F.3d 197, 200 (5th Cir. 1998) (quoting 46 U.S.C. App. 1301(e)). Under COGSA, a shipper seeking relief from a carrier for lost or damaged cargo bears the initial burden of establishing a prima facie case by demonstrating that the cargo was "loaded in an undamaged condition, and discharged in a damaged condition." Pet. App. A5 (internal citation omitted). If the shipper makes out a prima facie case, the carrier becomes presumptively liable for any loss and the burden shifts to the carrier to demonstrate either that it exercised due diligence, 46 U.S.C. App. 1304(1), or that the loss or damage occurred as a result of one of COGSA's 17 enumerated exemptions from carrier liability, 46 U.S.C. App. 1304(2)(a)-(q). See Pet. App. A6. If the carrier succeeds in rebutting the prima facie case, "the presumption of liability vanishes and the burden returns to the shipper to show that carrier negligence was at least a concurrent cause of the loss or damage to the cargo." *Ibid.* (internal citations omitted). If the shipper makes that showing, then the carrier bears the burden of apportioning damages and is liable for the full amount if it fails to do so. *Id.* at A6-A7. Petitioners do not take issue with this basic scheme. See Pet. 6-7.

2. This case involves shipments of materials for famine relief to Africa. On behalf of the Agency for International Development and several private relief organizations, the United States Commodity Credit Corporation shipped a variety of foodstuffs to five African ports between 1994 and 1996 aboard vessels owned by petitioners. Pet. App. A3. Much of the cargo was lost or damaged. *Id.* at A3-A4. The United States brought suit against petitioners under COGSA, seeking $203,319.87 in damages plus prejudgment interest. *Id.* at A4.

3. The district court ruled that the United States was entitled to only $7,300.08—the amount for which petitioners admitted that they were responsible. Pet. App. B1. The court noted that the United States had introduced bills of lading to demonstrate the amount of its damages and held that such evidence was sufficient to prove the value of the cargo. *Id.* at B2. The court also acknowledged that the government had introduced surveys made at the African ports that "specif[ied] the cargo's condition on delivery" and "detail[ed] reasons for non-delivery, including water damage, theft, and spillage." *Id.* at B3. The court concluded, however, that "the contents of the surveys [were] insufficient to establish [petitioners'] liability for the non-delivered and damaged cargo." *Ibid.* The court also ruled that, in any event, "[n]o shortage existed when the [ship's] holds were opened," and "the shipper must address the known thefts at port with it and its agents, not the carrier." *Ibid.*

4. The Fifth Circuit vacated the district court's judgment and rendered judgment in favor of the United States for the full amount of damages plus pre-judgment interest. Pet. App. A23. The court first noted that the parties agreed that their dispute was

governed by COGSA. *Id.* at A4-A5.[1] The court explained that most of COGSA's rules governing burdens of proof and shifting presumptions of liability were "developed to alleviate the perceived unfairness of certain common law rules [that] requir[ed] a shipper to conclusively prove the cause of cargo loss or damage notwithstanding the fact that the circumstances surrounding the loss or damage were primarily accessible to the defendant-carrier." *Id.* at A4 (quoting 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 10-23, at 115 (3d ed. 2001)).

The court held that the United States had made out a prima facie case, making petitioners presumptively liable for its losses. Pet. App. A7-A9. The court ruled that the government's production of "clean bills of lading [showing] that [petitioners] received the goods in an undamaged condition and survey reports showing that the goods were either missing upon discharge or were discharged in a damaged condition," was "clearly sufficient" to establish a prima facie case under COGSA. *Id.* at A7.

The court next concluded that petitioners had failed to rebut the government's prima facie case. Pet. App. A9-A20. Petitioners argued that they were entitled to rely on two statutory exemptions. *Id.* at A14. Their "main contention" was that the damage to the cargo had resulted from "insufficiency of packaging." *Id.* at A14-A15; see 46 U.S.C. App. 1304(2)(n). Petitioners

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[1] COGSA does not generally govern charter agreements. 46 U.S.C. App. 1305. Parties to such agreements may, however, include a "Clause Paramount" that makes their relationship subject to COGSA. Pet. App. A4 (citing 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 10-15, at 89 & n.6 (3d ed. 2001)). The charter agreements in this case contained such clauses. *Id.* at A4-A5.

also argued (Pet. App. A18) that they escaped liability based on Section 1304(2)(q)'s "catch-all" exemption, which covers "[a]ny other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier."

As the court of appeals explained, the catch-all exemption provides that "'the burden of proof shall be on the person claiming the benefit of this exception' to show that the carrier's fault or neglect did not contribute to the loss or damage." Pet. App. A10 (quoting 46 U.S.C. App. 1304(2)(q)). In contrast, Sections 1304(a)-(p) are silent as to the burden of proof. The court wrote that "[t]here is considerable controversy, and even an intra-circuit conflict, as to whether the carrier's rebuttal burden with respect to [the exemptions contained in Sections 1304(a)-(p)] is one of production or persuasion." Pet. App. A9.

In resolving petitioners' claim that they were absolved from liability under Section 1304(2)(n)—the exemption for losses that result from "insufficiency of packing"—the court stated that it was not "compelled to decide whether [petitioners'] rebuttal burden * * * was one of production or persuasion," because petitioners "failed to produce competent evidence to meet *either standard*." Pet. App. A15 (emphasis added). The court explained that "[w]ithout regard to whether [petitioners'] rebuttal burden under § 1304(2)(n) is one of production or persuasion, the law is absolutely clear that [they] must do more than offer mere speculation as to the cause of lost or damaged cargo." *Ibid.* The court emphasized that petitioners had offered no "probative evidence whatsoever" with respect to three of the five shipments at issue, and only a surveyor's speculation with respect to a fourth shipment. *Id.* at A16-A17. As for the remaining shipment, the court noted that

petitioners relied on "brief comments in [a] survey report," which, when weighed against the evidence that the United States had produced, were "insufficient to satisfy [petitioners'] rebuttal burden, without regard to whether that burden was one of production or persuasion." *Id.* at A18. The court rejected petitioners' contention that they were entitled to rely on the catch-all exemption, which was based on the argument that the loss and damages were caused by pilferage and careless discharge for which they were not legally responsible. *Id.* at A18-A20.

The court also held that petitioners would be liable even had they demonstrated that they were entitled to rely on the "insufficient packaging" or "catch-all" exemptions. Pet. App. A20. The Fifth Circuit explained that although "the record establishes that carrier negligence was at least a concurrent cause of the damages claimed," petitioners had "failed to make any attempt to apportion or separate the losses attributable to their own negligence as compared to the losses attributable to pilferage or some other cause." *Ibid.*[2] The court thus rendered judgment for the United States for $203,319.87. *Id.* at A23.

DISCUSSION

Petitioners contend (Pet. 6-21) that this Court should grant certiorari to resolve a conflict among the courts of appeals as to the nature of a carrier's burden in demonstrating the applicability of the exemptions from carrier liability contained in 46 U.S.C. App. 1304(2)(a)-

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[2] The court also rejected petitioners' assertion that the government had not produced competent evidence to prove its damages and held that the United States was entitled to prejudgment interest. Pet. App. A22. Petitioners do not challenge those holdings here.

(p). This case presents an inapt vehicle for resolving that question because the Fifth Circuit held that petitioners would lose under any standard, the court of appeals made clear that its decision can be justified on independent grounds, and it is unclear whether a ripe circuit conflict even exists.

1. This case does not present an appropriate vehicle for addressing the question upon which petitioners seek review because the court of appeals made clear that they would lose under *any* standard involved in the asserted split in authority. See Pet. App. A15 ("[W]e are not * * * compelled to decide whether [petitioners'] rebuttal burden * * * was one of production or persuasion," because they "failed to produce competent evidence to meet either standard."); *ibid.* ("Without regard to whether the carrier's rebuttal burden under § 1304(2)(n) is one of production or persuasion, the law is absolutely clear that the carrier must do more than offer mere speculation as to the cause of lost or damaged cargo."); *id.* at A16 (noting that petitioners had produced no "probative evidence whatsoever" relating to three of the five shipments at issue); *id.* at A17 ("With regard to the first shipment to Ghana" petitioners' evidence "is insufficient to meet even a burden of production."); *id.* at A18 (holding that, with regard to the second shipment to Ghana, petitioners' evidence was "insufficient to satisfy [their] rebuttal burden, without regard to whether the burden was one of production or persuasion"). Petitioners' contention (Pet. 13) that the court of appeals "impos[ed] an enhanced rebuttal burden" is incorrect. To the contrary, the Fifth Circuit's review of the record revealed that petitioners could not prevail under any standard. That fact-bound judgment does not merit this Court's review.

2. Further review is also unwarranted because the court of appeals' judgment can be justified on grounds that are completely independent from those upon which petitioners seek review. The Fifth Circuit determined that the United States would be entitled to a full recovery even had petitioners demonstrated the applicability of the "insufficient packing" exemption. Pet. App. A20. Because "carrier negligence was at least a concurrent cause of the damages claimed," *ibid.*, petitioners bore the burden of demonstrating which portions of the government's damages were not caused by their negligence. This petitioners failed to do. *Ibid.* (noting that petitioners "failed to make any attempt to apportion or separate the losses attributable to their own negligence as compared to the losses attributable to pilferage or some other cause"). The existence of this independent basis for the court of appeals' judgment supplies another reason against further review.

3. Finally, petitioners have not shown that any ripe circuit conflict that is relevant to this case even exists. COGSA is clear that a carrier seeking the benefit of Section 1304(2)(q)'s catch-all exemption has the burden of proving that "neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." 46 U.S.C. App. 1304(2)(q). The question presented is whether carriers must make a similar showing under Section 1304(2)(n), whose text contains no such language.

Petitioners have cited no case from any circuit other than the Fifth Circuit that suggests that a carrier's obligations under Section 1304(2)(n) are analogous to its burden under Section 1304(2)(q). As petitioners acknowledge (Pet. 8-10), the First, Second, and Third Circuits have observed that a carrier's responsibility

under Sections 1304(2)(a)-(p) is less stringent than its burden under the catch-all exemption. See *EAC Timberlane* v. *Pisces, Ltd.*, 745 F.2d 715, 720 & n.9 (1st Cir. 1984); *In re Ta Chi Navigation (Panama) Corp.*, 677 F.2d 225, 229 (2d Cir. 1982); *Sun Oil Co. of Pa.* v. *M/T Carisle*, 771 F.2d 805, 811 (3d Cir. 1985). Although petitioners correctly note (Pet. 9 n.3, 10-11) that the Ninth Circuit has held that carriers sometimes bear an enhanced burden when they seek to rely on Section 1304(2)(b)'s "fire exemption," see *Sunkist Growers, Inc.* v. *Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327 (1979), cert. denied, 444 U.S. 1012 (1980), that decision was based on the unique history of that provision, see *id.* at 1334-1341, and therefore does not indicate how the Ninth Circuit would construe the only exemption at issue in this case, Section 1304(2)(n). In addition, the fact that the Eleventh Circuit has not always "clearly differentiate[d] between the rebuttal burdens of proof required under the various COGSA exemptions" (Pet. 12) does not suggest how that court would resolve the question presented here.

In the end, petitioners can show only that different panels of the Fifth Circuit may have resolved the question presented in different ways. See Pet. App. A10-A14. But as demonstrated previously, see p. 7, *supra*, the court below had no need to, and did not, resolve any such intra-circuit tension. Moreover, any conflict within Fifth Circuit case law would be a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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